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CITATIONS.

Cases:

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Section 8 (a) (1)	1
Section 8 (a) (5)	1

No. 804.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ADAMS DAIRY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For Respondent in Opposition.

OPINION BELOW.

The Opinion of the Court of Appeals is reported at 350 F. 2d 108. The Order of this Court remanding the case to the Eighth Circuit for review in the light of **Fibreboard Paper Products Corp. v. National Labor Relations Board** (379 U. S. 203), is reported at 379 U. S. 644. The prior Opinion of the Eighth Circuit Court of Appeals is reported at 322 F. 2d 553. The findings of fact, conclusions of law and Order of the Board (R. 28) are reported at 137 NLRB 815.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

(1) Does an employer, who in three succesive labor agreements has repeatedly refused the Union's demands for restrictive covenants, limiting its right to sell directly at its plant dock to independent distributors, violate Sections 8 (a) (5) and (1) of the National Labor Relations Act when, motivated solely by economic and financial reasons, it quits the delivery phase of its business entirely, without further bargaining about that decision with the Union representing the employees terminated?

(2) If the above question is answered in the affirmative, may the Board, as a remedy for such a refusal to bargain, order the employer to reinstate the former driver employees to their former jobs and award them back pay for all time lost, even though the Company, during that period, no longer offered delivery service to its customers?

STATUTES INVOLVED.

The relevant portions of the National Labor Relations Act, as amended are:

61 Stat. 136, 73 Stat. 519, 29 U. S. C. 158 (1) and (5), which are set forth in Petitioner's Brief with other sections, pp. 38-40.

STATEMENT.

Facts of the Case.

In 1947, Adams Dairy, Inc. began its operation of processing and selling milk exclusively to retail super markets in the St. Louis area (R. 87). Starting at that time, all of its employees were represented by unions, but in three separate units. The Company's inside dairy workers, including office employees, were represented in bargaining by the Teamsters; its firemen and engineers, by the Operating Engineers; and its driver-salesmen, originally by the Teamsters. In 1954, after an election conducted by the National Labor Relations Board, its driver-salesmen selected the Independent Driver Salesmen Union, hereinafter called the "Union", to represent them (R. 73).

In 1952, two years prior to the election, the Company started to utilize two methods of distribution. One was delivery by its driver-salesmen, and the other was sales at its plant loading dock. to independent distributors, who bought the products and resold them to their customers. Originally, the driver-salesmen were used in St. Louis and St. Louis County, while the independent distributors worked territories in counties surrounding St. Louis. In 1956, when these employees were represented by the Union, one driver-salesman, delivered milk products for the Company in East St. Louis, Illinois. This route was taken from the employee and an independent distributor started selling in that area. The Union made no objection to this move (R. 74).

The history of bargaining between the Company and the Union is replete with negotiations concerning the independent distributors. In 1954, during the contract negotiations with the newly recognized union, the Company refused the Union's demand to limit the use of independ-

ent distributors and signed a two year contract without any limitation on the use of independent distributors (R. 103). During the term of this first contract, the Company sold dairy products at its dock directly to a customer who was within the wholesale delivery route of one of the driver-salesmen employees. The Union claimed the driver-salesman was entitled to be compensated in the form of commission on these sales. The Company and the Union arbitrated the matter (R. 104). The arbitrator decided that no commission was earned or due, ". . . that Company had the absolute right to make this type of sale since it was not prohibited by any contractual agreement with Union from doing so and for the further reason that the Company is in effect compelled by Missouri law to make such sales, . . ." (R. 146).

In the 1956 contract negotiations, a written proposal was made by the Union to limit the further use of distributors. The Union proposal was that commission would be paid to driver-salesmen employees on all sales of products used or resold by distributors on the prescribed routes (R. 139). The Company negotiated a three year contract, without this provision. In 1959, when a new contract was to be negotiated, the Union demanded a specific restriction on the use of independent distributors (R. 88, 104). Once again, the Company resisted the demand and a three year contract was signed effective September 1, 1959, which had no limitation on the use of independent distributors (R. 104, 106).

On November 18, 1959, the Company called a meeting with the Union representatives to point out that the Company was not competitive in the market with some dairies. The President stated that the Company's price was some 2¢ higher than the competition (R. 89). The Company's proposition to the Union was "to work out something with them that would make us competitive with those dairies" (R. 89). Following this meeting, there were four other

meetings during November and December of 1959. At two of these meetings, only the lawyer for the Union Committee was present. At the last meeting in December, the union said they would consider the proposition and give the Company an answer. This they never did (R. 89). However, the Union President testified that the Union held a meeting in which they voted to keep the Contract as it was and not make any changes in it (R. 82).

At that time, the driver-salesmen were working thirty to thirty-eight hours per week and their average earnings were $14,495.00 per year (R. 88). The Company had told the Union that they had a sales campaign in mind which would increase sales, but could get no agreement on the change of the sales commission of the driver-salesmen. Furthermore, by this time, the Company had some ten independent distributors buying milk at its dock (R. 92). It maintained a list of men who wanted to become distributors for opening up new territories and for any present distributor that wanted to make a change.

On January 9, 1960, the Company put on a new distributor who sold in the area formerly serviced by a driver salesman. Then, on February 21, 1960, the Company President called a meeting with the Union officers and told them that he was going to sell to independent distributors. At the time, he had four signed to a franchise agreement (R. 90). After the conversation with the Union representatives, he went back to the dairy and that evening, found six more who wanted to be distributors (R. 91, 95). The Company sold the distributors its delivery equipment for cash in every instance, and no longer engaged in selling milk except at its dock (R. 99).

On February 24, 1960, at about 11:00 a. m., the Union gave notice to the Company that they desired a meeting. Within two and one-half hours, the Company sat down with the Union at a meeting (R. 80). The Union asked

the reason for the Company's action and whether the driver-salesmen were fired. The Company answered that the drivers were terminated because the method of operation had changed and that they were no longer engaging in milk distribution. The Union at that time and until the present have made other demand on the Company as far as the independent distributors were concerned (R. 80-81).[1]

The Board's Decision and Order.

The Board in January, 1962, some twenty-eight months after the Company had gone out of the delivery business made a finding that the Company violated Section 8 (a) (5) and (1) of the Act, and adopted the Trial Examiner's finding, conclusion and recommendation, with certain modifications (R. 3). The Board ordered that the Company should reinstate all of its driver-salesmen to their former positions and make them whole for all lost wages. This remedy was ordered even though the findings of facts stated:

> "The record is devoid of anti union statements or attitudes usually present where there is a strong opposition to unions by an employer. Nor is there any pattern of conduct which would support a finding that Respondent was hostile to labor organizations generally or to the Union in particular.
>
> "Moreover, there is also evidence in support of Respondent's claim that the changeover from the delivery by its own driver-salesmen to delivery by independent distributors had an economic motivation" (R. 22).

The Board's findings further included the acknowledgment of the fact that the Union had sought and failed in

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[1] On January 1, 1964, Adams Dairy, Inc. sold all of its physical properties to Sanitary Milk Producers, a Farmer's Co-Operative, and the corporation was dissolved.

successive contract negotiations to limit the Company's use of independent distributors. The Board, however, claims that these negotiations and the resisting of the Union's demands only left the Company, "free to utilize independent distributors to make inroads on driver-salesmen's routes", never the question replacing driver-salesmen altogether (R. 18).

The Court of Appeals' Decisions.

On a Petition for Enforcement, this Eighth Circuit Court of Appeals found:

> "In the instant case we have a long history of negotiations between the employer and the union with reference to the union's desire to have a clause included in their contract preventing the employer from changing over from driver-salesmen employees to independent contractors, the refusal to so agree by the employer and the continuous complaint of the employer that its delivery costs were so high as to create an unfavorable competitive situation with reference to other dairies, plus the employer's request of the union for suggestions and co-operation regarding the lowering of delivery costs." (**National Labor Relations Board v. Adams Dairy, Inc.**, 322 F. 2d 553, 561 (C. A. 8).)

The Court then held that the decision on the part of the Company to terminate a phase of its business was not a required subject of collective bargaining, however, after that decision had been made there was a requirement to bargain with reference to the treatment of the employees who were terminated. The Court further held that the remedy fixed by the Board was entirely too broad. Since there were no employees left in the bargaining unit, and the record indicated no jobs available since the Company had no other plants, there was only a ques-

tion of severance pay. The Court found that the contract did provide for severance pay of four months basic pay and commission and awarded this to the twenty-four drivers.

Upon a determination by the Board it was found that this award of four months pay amounted to $80,000.00 for the twenty-four drivers, which sum, the Company placed into the Registry of the Court.

The Board petitioned the Supreme Court for a Writ of Certiorari in January of 1964, on the two identical questions presented in their present Brief, and this Court, in January of 1965, granted the Petition, vacated the Judgment and remanded the case for reconsideration in the light of its recent decision in **Fibreboard Paper Products Corp. v. National Labor Relations Board**, 379 U. S. 203 (hereinafter referred to as "Fibreboard").

The Court of Appeals after remand stated:

> "After consideration of additional briefs, filed by the parties, oral argument of counsel and a viewing this situation in the light of Fibreboard as directed, we believe our original opinion to have been correct. We conclude that Adams Dairy is so factually distinguishable from Fibreboard as to take Adams outside the orbit of the Fibreboard holdings" (Plaintiff's Brief, App. A, p. 21).

The Court then in detail distinguished and pointed out the differences in the two cases and again concluded that the Board's remedy was much too broad. It found that the labor agreement specifically provided for severance pay and reinstated the remedy it first found.

ARGUMENT AGAINST GRANTING CERTIORARI.

A cursory examination of the Appellate Court's opinion after remand by the Supreme Court, reveals the reason why this Court should not again grant Certiorari on the same two questions which were presented to it in this same case in January, 1964, and especially in a case that has dragged through the Courts for six years to a point of time when the Company is no longer even in existence. The further litigation would only result in chastisement and harassment of a Company that was motivated by economics and no union animosity.

The Appellate Court's Opinion is rife with the comparison of the Adam's factual situation with the benchmarks laid down in **Fibreboard.** No principles of law are enumerated that run contrary to those laid down by this Court in **Fibreboard.** The Court of Appeal's Opinion states particularly that the type of contracting out involved in **Fibreboard**—"the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment"—does not exist in this case. This Court stated in Fibreboard, "Our decision need not and does not encompass other forms of 'contracting out' or 'sub-contracting', which arise in our complex economy." The Court of Appeals, in reviewing this case, pointed out the lack of identity with **Fibreboard** in the Company's basic operation after the discontinuance of the Company's distribution system. Among the difference were:

1. All of the Company's equipment was sold for cash, without the company financing the sale or arranging for financing.

2. The routes travelled by the independent distributors were not similar in size or number to the prior routes.

3. Title to the products transferred to the independent distributors at dockside and, thus, the Company legally had no concern as to what was done with the products.

4. The independent distributors were solely responsible for selling the products.

5. The work was not done in the plant for the benefit of the Company.

6. The Company was not directly concerned whether or not any independent distributor sustained a profit or a loss.

7. There was a change in the capital structure of the Company.

The Court of Appeals reiterated the findings of the Board that the change was accomplished because of economic motivation without the presence of any anti union animus. The Court further pointed out that in Adams, but not in **Fibreboard**, the Company had negotiated in three successive contracts to exclude a clause which would have prevented the Company from putting on independent distributors. The change over was made during the contract year and then only after the Company had initiated a series of meetings with the Union for the purpose of discussing the unfavorable competitive situation it found itself in, due to lower delivery costs of other dairies. Even these meetings, the Court found, were bargaining, as required under Section 9 (a) of the Act, albeit the Union did not get what it desired.

The Petitioner has been continually arguing for the past six years before the Board and before the Courts, and is still arguing that although Adams had the right to utilize independent distributors, and was utilizing them at the time of the termination of its drivers, that the Company never suggested to the Union that it contemplated quitting the delivery business entirely. The Court of

Appeals noted this argument and stated that, had the Company ever stated to the Union that unless it received a reduction in wages, it would eliminate all drivers by selling its distribution business, such threats might well have been constituted coercive behavior. The Court of Appeals cited this Court's statement in **Textile Workers v. Darlington Mfg. Co., 380 U. S. 263**, fn. 274, where this Court held that nothing would justify an employer interfering with the employees' organizational activities by threatening to close the plant, as distinguished from announcing a desire to close already reached by a Board of Directors of a Company. The Court of Appeals further found that the labor contract, itself, in Article 7, provided that there was nothing in the contract that would prevent the employer from eliminating any route or routes. It found that the parties further provided in Article 7 of the contract the amount due to any employee who was taken off a delivery route which was paying a commission. The Court stated the remedy, as sought by the Board, of reemployment and back pay of over $750,000.00, was entirely too broad, excessive and unrealistic and would become confiscatory and unjust.

This Court set forth its Decision in **Fibreboard** in the context, as the Chief Justice stated, on "the type of contracting out in this case." The Solicitor General pointed out to the Court in the **Fibreboard** case that "contracting out" and "sub-contracting" have no precise meaning (See Footnote 8, Fibreboard). This Court can merely set the guide lines for the lower courts and the Board to follow. The former Solicitor General in arguing the **Fibreboard** case before the Supreme Court, argued that the problem in the Adams case was a different problem than in **Fibreboard**[2], yet the Petitioner now claims the factual situation must mold into **Fibreboard.**

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[2] Transcript of Proceedings, p. 44, before the Supreme Court, the Solicitor General in answer to Justice White's question,

Since the Decision in **Fibreboard,** the Board itself has departed from its doctrine of wide scope application of the duty to bargain on all phases of "contracting out" and "sub-contracting". In **Westinghouse Electric Corporation,** 150 NLRB 136, the Board recognized the theory of waiver by past practices and limited the duty to bargain, stating that the condemnation of unilaterally subcontracting work in **Fibreboard,** "was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved. Thus, it is wrong to assume, that, in the absence of an existing contractual waiver, it is a per se unfair labor practice in all situations for an employer to let out unit work without consulting the unit bargaining representative." In support of their new position, they cited **National Labor Relations Board v. Benne Katz,** 369 U. S. 736, 748, and concluded that there are circumstances that the Board could and should accept as excusing or justifying unilateral action.

The basic reason stated by the Petitioner for the Court to grant Certiorari, is that it believes the distinctions made by the Court of Appeals are "unsound" (Petitioner's Brief, p. 17). The Petitioners have presented the same two questions to the Supreme Court that were before it in this same case two years ago. The Appellate Court has exercised its mature sound judgment in reviewing this case in the light of **Fibreboard.** There is no legal controversy present here, but merely the Petitioner's claim that the lower court's fact finding is unreasonable or plainly wrong. These reasons are not of the character which Supreme Court Rule 19 states will be considered for granting of review on Certiorari.

"If Mr. Justice White, there is a contract and it says nothing about sub-contracting, then we have quite a different question, one which may be here in the Adams Dairy case, one on which the Board has a number of rules, one which, in my judgment, is an intensely different problem."

This Court in **National Labor Relations Board v. American National Life Insurance Co.**, 343 U. S. 395, 410, stated, "We stated that this Court 'is not the place to review a conflict of evidence, nor to reverse a Court of Appeals, because were we in its place, we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way.' **National Labor Relations Board v. Pittsburgh S. S. Co.**, 340 U. S. 498, 503. We repeat and reaffirm this rule noting its special applicability to cases where as here, a statutory standard such as 'good faith' can have a meaning only in its application to the particular facts of a particular case."

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 6, 1966.